

83-829

NO.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1983

MOVIBLE OFFSHORE, INC.

Petitioner,

V.

**MARY OLSEN, CHRISTINE W. CARVIN,
GORDON DAVIS WALLACE, and
ARGONAUT INSURANCE COMPANY**

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITES STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The questions presented for review are: (1) whether federal maritime law, as enunciated in *Federal Maritime Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969) governs an accident on a stationary platform on the Outer Continental Shelf; (2) whether a tortfeasor may be condemned to pay compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act in excess of such tortfeasor's maximum tort liability; and (3) whether 28 U.S.C. Section 1961 precludes an award of pre-judgment interest on a judgment for damages resulting from an accident on a statutory platform on the Outer Continental Shelf.

LIST OF PARTIES

The parties to the Fifth Circuit proceedings were the Movable Offshore, Inc., Teledyne Movable Offshore, Teledyne, Inc., Shell Oil, Mary Olsen, Christine Carvin, Gordon Davis Wallace, William P. Rutledge. The concerns affiliated with the proceeding were as follows:

Travelers Insurance Company
C. L. Wiegand Co. and Therm-O-Disc, Inc.
Texsteam Corporation
Argonaut Insurance Company
Pacific Indemnity Company
Insurance Company of North America

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SHELL OIL COMPANY,

Petitioner

versus

MARY OLSEN, CHRISTINE W. CARVIN,
GORDON W. WALLACE, and ARGONAUT
INSURANCE COMPANY

Respondents

PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

This matter has had a complex and tortured legal history. The matter was first tried, and all appeals exhausted, on liability. The damages issue was then tried, and this application pertains to that issue.

LIABILITY

DISTRICT COURT—

1. The opinions of the United States District Court for the Eastern District of Louisiana [Minute Entry (June 6, 1974) and Minute Entry (July 15, 1975) are not reported.

COURT OF APPEALS—

2. *Olsen v. Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977), *rehearing en banc denied*, 565 F.2d 163 (5th Cir. 1977) [initial decision on liability affirming negligence of Movable Offshore, Inc.]

3. *Olsen v. Shell Oil Co.*, 574 F.2d 194 (5th Cir. 1978) [certification to Louisiana Supreme Court of questions of Louisiana strict liability and its effect on Shell Oil Co.]

4. *Olsen v. Shell Oil Co.*, 365 So.2d 1285 (La. 1978) [certified questions answered finding Shell Oil Co. strictly (vicariously) liable]

5. *Olsen v. Shell Oil Co.*, 595 F.2d 1099 (5th Cir. 1979) [final decision on liability]

QUANTUM (DAMAGES)

DISTRICT COURT—

6. The opinion of the United States District Court for the Eastern District of Louisiana [minute entry (April 22, 1982)] is not reported.

COURT OF APPEALS—

7. *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), *rehearing en banc denied* (September 26, 1983)

JURISDICTION

This appeal arises questions of law under the United States Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, and the Outer Continental Shelf Lands Act, 43 U.S.C. §1333 *et seq.*

The decision at issue of the United States Court of Appeals for the Fifth Circuit was entered on July 5, 1983. The Application for Rehearing En Banc was denied by the Court of Appeals in an order entered on September 26, 1983.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This Petition raises issues under the following provisions of the United States Longshoremen's and Harbor Workers' Compensation Act [LHWCA] and the Outer Continental Shelf Lands Act [OCSLA]:

LHWCA 33 U.S.C. §933

§933. Compensation for injuries where third persons are liable

(a) **Election of remedies.** If on account of a disability or death for which compensation is payable under this Act, the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) **Acceptance of compensation acting as assignment.** Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner of Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person

shall commence an action against such third person within six months after such award.

(c) Payment into section 944 fund operating as assignment. The payment of such compensation into the fund established in section 44 [33 U.S.C.S. §944] shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Institution of proceedings or compromise by assignee. Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Recoveries by assignee. Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 7 [33 U.S.C.S. §907];

(C) all amounts paid as compensation;

(D) the present value of all amounts

thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7 [33 U.S.C.S. §907], to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

(f) Institution of proceedings by person entitled to compensation. If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) [subsec. (b) of this section] the employer shall be required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) Compromise obtained by person entitled to compensation. If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if the written approval of such compromise is obtained from the

employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

(h) Subrogation. Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) Right to compensation as exclusive remedy. The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

(Mar. 4, 1927, ch 509, § 33, 44 Stat. 1440; June 25, 1938, ch 685, §§ 12, 13, 52 Stat. 1168; Aug. 18, 1959, P.L. 86-171, 73 Stat. 391; Oct. 27, 1972, P.L. 92-576, § 15(f)-(h), 86 Stat. 1262).

OCSLA 43 U.S.C. §1333

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction. (1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or

temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this Act.

(2) (A) To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after the date of enactment of this subparagraph [enacted Sept. 18, 1978], the President shall establish procedures for setting [setting] any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States

shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshoremen's and Harbor Workers' Compensation Act applicable; definitions. With respect to disability or death of an employee resulting from any injury occurring as the result of operations, conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C.S. §§901 et seq.] For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C.S. §§901 et seq.] under this section—

(1) The term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

This Petition also raises issues under the Federal Interest Statute:

Federal Interest Statute 28 U.S.C. §1961

§1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

STATEMENT OF THE CASE

This appeal on behalf of Teledyne Movable Offshore is a result of litigation arising out of a May 6, 1970 explosion wherein several employees of Teledyne Movable Offshore were either killed or severely injured in the living quarters of a fixed drilling platform owned by Shell Oil Company, located on the Outer Continental Shelf.

The insured employees and the survivors of the deceased employees were and are being paid compensation benefits in accordance with the LHWCA by Argonaut

Insurance Company, the compensation insurer of Teledyne Movable Offshore; however, searching for a "more accessible purse",* they instituted suit against Shell to recover tort damages. Shell relying on a contract with Teledyne Movable Offshore asserted a third party claim for indemnity.

Throughout the entire trial no litigant has contested that the Outer Continental Shelf Lands Act, 43 U.S.C. Sec. 1333, et seq., applies and provides the relevant jurisdiction thereunder. Following the bifurcated trial on the merits on July 9, 1974, Judge Frederick J. R. Heebe rendered judgment on the issue of liability in favor of the platform owner, and an appeal was taken by *all plaintiffs* in the litigation. On appeal, *Olsen v. Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977), this Court certified certain questions of Louisiana law to the Louisiana Supreme Court, *Olsen v. Shell Oil Co.*, 365 So.2d 1285 (La. 1978), contrary to then established precedent, extended the doctrine of strict liability in Louisiana and resolved the certified questions in favor of plaintiffs and against Shell Oil Company.

Thereafter, the Fifth Circuit, adopting the reasoning of the Louisiana Supreme Court in *Olsen v. Shell Oil Co.*, 595 F.2d 1099 (5th Cir. 1979), resolved the remaining questions of liability and held *inter alia*, that Shell is entitled to indemnity against Movable Offshore, Inc. In that opinion, the Court remanded these consolidated cases to the District Court for trial on all of the issues regarding quantum.

* What the Court of Appeals probably intended to say was a "deeper purse" because there was no more accessible purse than that of the employer and its compensation insurer.

Those issues were tried before Special Magistrate Kenneth Hughes on December 18-21, 1979. On June 29, 1981, the Special Magistrate entered his proposed findings and recommendations. The District Court, upon review of the magistrate's proposed findings and recommendations, by Minute Entry dated April 22, 1982, affirmed and modified them in part. The District Court thereafter entered judgment on the quantum issue on May 24, 1982. From this judgment, Teledyne Movable Offshore appealed and on July 5, 1983, the Court of Appeals, Patrick E. Higginbotham, held *inter alia* that where a District Court awards pre-judgment interest to a prevailing Outer Continental Shelf Lands Act, plaintiff whose remedy is based on surrogate State law, the award should not be disturbed on appeal if supported by that State law. The Court went on to state that they felt the mandating of pre-judgment interest was consistent with precepts of *Rodrigue* and *Huson*, and that pre-judgment interest, along with inflationary measures, ought to be regarded as integral to each other and to the State law remedy. The Court of Appeals, relying on *Federal Maritime Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969) and in direct conflict with 33 U.S.C. Sec. 933(f), and relevant jurisprudence thereunder, further held, Shell liable to the plaintiffs for compensation benefits in excess of Shell's maximum tort liability and ordered Shell to assume the direct payment of all future compensation benefits to the injured workers and the survivors of the deceased workers.

This Writ of Certiorari is sought by petitioner, as consideration by this High Court is necessary to secure and maintain uniformity of decisions regarding the interpretation of 33 U.S.C. 933(f) and, to remedy what is an aberration in the law, namely, the Court of Appeals' the application of the adjacent state's Interest Statute to a cause of

action brought under the Outer Continental Shelf Lands Act, in direct contradiction to the Federal Statute.

ARGUMENT

ISSUE I.

WHETHER *FEDERAL MARINE TERMINALS, INC. V. BURNSIDE SHIPPING CO.*, 394 U.S. 404 (1969) APPLIES TO AN ACCIDENT ON A STATIONARY PLATFORM ON THE OUTER CONTINENTAL SHELF.

The Court held that Section 33 of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) did not constitute the compensation insurer's exclusive remedy against the third-party tortfeasor and, citing *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969), awarded the compensation insurer an amount in excess of the potential tort recovery of the victims or their survivors. In so holding, the Court of Appeals erroneously applied federal maritime law to an accident which occurred on a fixed platform on the Outer Continental Shelf. The Court conceded, as it must, that "Shell's fixed oil platform...is not a 'vessel' within the meaning of the LHWCA", but, nevertheless, ruled that *Burnside, supra*, a suit by a stevedoring company against a vessel owner and, thus, governed by federal maritime law, "foreclose(s)" Shell's and Teledyne's argument that they cannot be held liable for any amount in excess of plaintiff's tort recovery. The Court's reliance on *Burnside, supra*, is misplaced for three reasons:

(1) *Burnside* applies only to actions between a vessel and stevedore and is based exclusively on federal maritime law.

(2) It applies only in cases where state law, in that case Illinois law, imposes statutory limits on tort recovery. (Louisiana law, applicable to this case, imposes no such limits.)

(3) It has been rendered obsolete by the 1972 amendment to Section 905(b) of the LHWCA. *Hinson v. SS PAROS*, 461 F.Supp. 219, 223 (S.D. Tex. 1978) held that:

...the Amended Act as a whole, and Sec. 905(b) in particular, has modified *Burnside* to the extent that *employers or their compensation insurance carriers are limited to the recovery of compensation benefits paid, as provided in Sec. 933, and that in no instance can they recover more than the injured worker or his beneficiaries.* (Emphasis supplied.)

ISSUE II.

WHETHER (a) THE ENTRY OF JUDGMENT IN FAVOR OF THE COMPENSATION INSURER AND AGAINST THE THIRD-PARTY TORTFEASOR IN EXCESS OF SUCH TORTFEASOR'S MAXIMUM TORT LIABILITY, (b) THE TERMINATION OF THE COMPENSATION INSURER'S OBLIGATION FOR FUTURE COMPENSATION BENEFITS AND TRANSFER OF SUCH OBLIGATION TO THE THIRD-PARTY TORTFEASOR, AND (c) THE FAILURE TO CREDIT PLAINTIFF'S NET RECOVERY AGAINST FUTURE COMPENSATION BENEFITS VIOLATES SECTION 33 OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. 933, AND RELEVANT JURISPRUDENCE THEREUNDER.

The Court committed no less than three errors in adjudging the rights and obligations of defendant Shell and

intervenor-plaintiff* Argonaut Insurance Company, the workmen's compensation carrier of Teledyne Movable Off-shore, Inc. which employed the persons killed or injured aboard Shell's platform. All three of these errors are traceable directly to the Court's failure to distinguish between tort and workmen's compensation remedies by holding the third-party tortfeasor, Shell, liable for tort damages to the plaintiffs, as well as for compensation benefits which exceed the amount of the tort judgment. As discussed below, the Court's holding is in direct conflict with the provisions of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), as interpreted and supplemented by relevant court decisions.

The law governing the respective rights and obligations of the injured platform worker or the survivor, the employer/insurer and the third-party tortfeasor is found in Section 33 of the LHWCA as amended and supplemented by relevant court decisions, and provides as follows:

(1) An injured worker or his survivor may sue a third-party tortfeasor for damages and collect compensation benefits from his employer/insurer. 33 U.S.C. Sec. 933(a).

(2) To prevent double recovery, the employer/insurer is granted a lien on the proceeds of the worker's judgment against the third-party tortfeasor, which lien must be paid by preference. *Valentino v. Rickners Rhederie*, G.m.b. H. 417 F.Supp. 176 (E.D.N.Y. 1976), *aff'd*, 552 F.2d 466 (2d Cir. 1977).

(3) The "employer (or his insurer)...remains liable for

* Argonaut is an intervenor in C.A. 70-1240, C.A. 70-2968, C.A. 71-894, and C.A. 71-1144, and a plaintiff in C.A. 71-1265.

any amount by which the recovery against the (wrongdoer) falls short of the prescribed compensation." *Chapman v. Hoage*, 296 U.S. 526, 528 (1936); *Nacirema Operating Co. v. Oosting*, 456 F.2d 956, 959 (4th Cir.), *cert. denied*, 409 U.S. 980 (1972); 33 U.S.C. Sec. 933(f).

(4) In cases where an employee's tort recovery exceeds the then existing compensation lien, but compensation payments are continuing for an indefinite period of time, the employer or his insurer are entitled to a satisfaction of the existing lien plus a credit of plaintiff's net recovery against future compensation payments. *Stark v. Shell Oil Co.*, 450 F.2d 994 (5th Cir. 1971); *Voris v. Gulf-Tide Stevedores*, 211 F.2d 549 (5th Cir.), *cert. denied*, 348 U.S. 823 (1954).

The Court's decision is inexplicable. Not only did the Court fail to credit plaintiffs' net recovery against Argonaut's future compensation payments, it also relieved Argonaut from any obligation to make future compensation payments by condemning Shell, the tortfeasor, to assume such obligation. Thus, the Court of Appeals, in direct conflict with the statute and jurisprudence established by this Court, permitted plaintiffs, Christine Carvin and Gordon Wallace, to retain the amount awarded them, subject only to a lien for compensation benefits paid "to the date of payment of judgment" and ordered that "defendant Shell Oil Company shall assume payment of any amounts of compensation benefits or medical expenses which Argonaut Insurance Company may become obligated to pay subsequent to the date of payment of judgment herein for the injuries sustained as a result of the accident involved in this litigation". The Court's decision is in direct contravention of the statutory mandate contained in

33 U.S.C. Sec. 933(f),* which obligates the employer or his compensation insurer to pay all compensation benefits in excess of the worker's tort recovery.

ISSUE III

WHETHER 28 U.S.C. SECTION 1961 PRECLUDES AN AWARD OF PRE-JUDGMENT INTEREST ON A JUDGMENT FOR DAMAGES RESULTING FROM AN ACCIDENT ON A STATIONARY PLATFORM ON THE OUTER CONTINENTAL SHELF.

This action was filed and pursued under the Outer Continental Shelf Lands Act, (OCSLA), 43 U.S.C. Sec. 1333, et seq. Before July 5, 1983, there was no question but that under a case arising under the OCSLA, Federal District Courts were *bound* to apply the Federal Interest Statute, 28 U.S.C. Sec. 1961, which specifically *precludes* an award of pre-judgment interest. The applicable statute states:

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the laws of the state in which such court is held, execution may be levied for interest on judgment rendered in the courts of the state. Such interest *shall* be calculated from the date

* Section 933(f), in pertinent part, provides as follows:

If the person entitled to compensation institutes proceedings...the employer (or his insurer) shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or debts over the amount recovered against such third person.

of the entry of judgment at the rate allowed by the state law. (Emphasis supplied.)

Under the OCSLA, State law cannot be utilized unless there is a "gap" in Federal law, *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The Court in *Huson* went on to state that the application of Louisiana law is, of course, subject to the absence of "inconsistent" and applicable Federal law, *Huson, supra*, at page 354. It is clear that in the instant situation, there is no "gap" in federal law. Further, the presence of "inconsistent" and applicable federal law mandates the use of federal law. There can be no question but that under the Supreme Court mandates of *Rodrigue* and *Huson*, Federal law will prevail *whenever a conflict with an applicable State law exists*. The area of legal interest has long been legislated by the Federal government, and in this Circuit the Federal Interest Statute has been applied *uniformly in every* Outer Continental Shelf Lands Act case which has ever been brought before this Court. Beginning with *Berry v. Sladco, Inc.*, 495 F.2d 523 (5th Cir. 1974), the Court held that where both Louisiana and Federal Interest Statutes were applicable, the Federal Interest Statute would apply. The Court stated:

The tenets of *Rodrigue* make firm the conclusion that 28 U.S.C. 1961 controls the applicable time period for determining interest in this case. Sec. 1961 provides in relevant part that the interest *shall* be calculated from the date of the entry of this judgment, at the rate allowed by state law. This is a positive statement of federal law, obligatory in its terms, and as such is controlling in an action brought under the Lands Act. Moreover, permitting interest to accrue from judicial demand would certainly be inconsistent

with the result provided by Sec. 1961. The district court was correct in limiting interest from the date of its judgment. *Berry*, *supra* at page 528.

Both *Berry* and *Huson* held that where State law is inconsistent with the area regulated by the applicable Federal law, the Federal law was to predominate. Until the decision by the *Olsen* panel, the Fifth Circuit Court of Appeals has been uniform in applying 28 U.S.C. Sec. 1961 to cases involving personal injury and death on a platform on the Outer Continental Shelf. Following *Berry v. Sladco, Inc.*, *supra*, the rule that the Federal Interest Statute prevails over the Louisiana interest statute was reaffirmed in *Aymond v. Texaco*, 554 F.2d 1206 (5th Cir. 1977). The *Aymond* Court held that even if there existed diversity of citizenship, the Outer Continental Shelf Lands Act still required the application of the Federal Interest Statute to cases arising on the Outer Continental Shelf. See, *Aymond*, *supra*, at 211-212. In both the *Berry* and *Aymond* cases, the plaintiffs vehemently argued their right to pre-judgment interest and in both of those cases the Fifth Circuit Court of Appeals properly applied 28 U.S.C. Sec. 1961 and held that the statute *mandated* that the interest would (the word used by the statute is "shall") run only from the date of entry of judgment. The applicable statute governing interest, Sec. 1961, is clear. Certainly the Congressional intent of that statute has never been questioned or even raised by any Court; and clearly, the *Berry* and *Aymond* cases mandate interest to run from the date of judgment.

In *Evañs v. Chevron Oil Company*, 438 F.Supp. 1097 (E.D. La. 1977), an action was brought for the wrongful death of an employee who was performing certain welding work on an offshore oil platform and slipped and fell to his

death while walking on the main deck of that platform. Judge Fred Cassibry granted a verdict in favor of plaintiff totaling \$447,878.67 with judicial interest to run from the date of judgment. Plaintiff, Mrs. Jackie Evans, appealed the issue of pre-judgment interest, as well as the issue of admissibility of inflationary evidence. Briefs were filed by all parties to the *Evans* litigation, including an *amicus brief* on behalf of Mary Olsen, Christine Carvin and Gordon Wallace in support of plaintiff-appellant's position on the issues of pre-judgment interest and future inflation. It should be noted similarly to the facts in the case at bar that the basis of the *Evans* action was a 1968 accident wherein Mr. Evans was killed. Despite the fact that the litigation was not brought to its ultimate conclusion until ten years later, the District Court, following the mandate of *Berry, supra* and *Aymond, supra*, denied the granting of pre-judgment interest. Following oral argument by all parties, the Fifth Circuit Court of Appeals in a per curiam decision cited at 616 F.2d 565 affirmed the District Court's decision regarding damages and pre-judgment interest holding that in a wrongful death case arising under the Outer Continental Shelf Lands Act, interest on judgment runs from the date of the judgment. *Berry, Aymond* and *Evans* required the application of the Federal Interest Statute, 28 U.S.C. Sec. 1961, in suits arising on the Outer Continental Shelf and clearly they interpret interest on any judgment to run from the date of judgment. Furthermore, it should be noted that even the decision of *Barrios v. Louisiana Construction Materials Company*, 465 F.2d 1157 (5th Cir. 1972) recognizes, apparently from an equitable viewpoint, why pre-judgment interest is *not* applicable where there would be "substantial compensation for...future loss of earnings." 465 F.2d at 1168 (Emphasis added).

The decisions of the Fifth Circuit Court of Appeals in

Berry, Aymond and Evans were followed in 1983 by the decision of *Musial v. A & A Boats, Inc.*, 696 F.2d 1149 (5th Cir. 1983). Again the Fifth Circuit panel in no uncertain terms stated that:

An award of interest in a suit brought under Outer Continental Shelf Lands Act is *Sladco, Inc.*, 494 F.2d 523, 528 (5th Cir. 1974). Hence, pursuant to 28 U.S.C. Sec. 1961 "such interest shall be calculated from the date of entry of the judgment, at the rate allowed by state law." *Aymond v. Texaco, Inc.*, 554 F.2d 206, 211 (5th Cir. 1977). *Musial*, at 1154.

The panel in *Olsen* apparently decided to ignore the prior uniform decision of the Fifth Circuit and apply their own law, holding that Louisiana law applies and that the Louisiana Revised Statutes Sec. 13:4203 should apply mandating pre-judgment interest in every Outer Continental Shelf Lands Act case. Relying on a decision wherein pre-judgment interest was denied, *Ellis v. Chevron USA, Inc.*, 650 F.2d 94 (5th Cir. 1981), the *Olsen* panel determined that "pre-judgment interest, and inflationary measures, ought to be regarded as integral to each other and to the State law remedy." The Court totally ignored the fact that the State law is in absolute conflict with the Federal Interest Statute and that every single previous decision has absolutely held that the Federal Interest Statute, 28 U.S.C. Sec. 1961, applies to a case arising out of the Outer Continental Shelf Lands Act. While accepting the fact that *Berry, Aymond, Evans* and *Musial* have all clearly dictated that 28 U.S.C. Sec. 1961 controls in a case arising under the Outer Continental Shelf Lands Act, the *Olsen* panel simply determined that they were going to choose not to apply those cases and, instead, to apply Louisiana law adopting the dictum from the *Ellis* case. The Court, obviously

affected by the fact that final judgment was being entered more than a decade after the suit was originally filed, decided to let its notion of equity overrule the uniform jurisprudence existing in this Circuit. In that regard, the facts in the case at bar relative to the issue of pre-judgment interest are nearly identical to those faced by the Fifth Circuit panel in *Evans v. Chevron, supra*:

1. A deceased plaintiff;
2. An accident that occurred on a platform governed by Outer Continental Shelf Lands Act;
3. Judgment was not rendered in that case until over ten years following the date of the accident; and
4. The district court following the controlling jurisprudence denied the granting of pre-judgment interest.

The same arguments of equity and "justice" were made to the Court in *Evans* and the Court unanimously rejected those arguments and applied the correct law. The *Olsen* panel did not adopt the "discretion" dicta of the Ellis court, but has now held that state law applied (regarding the tolling of interest) in cases arising under OCSLA despite the obvious conflict and inconsistency with the Federal Interest Statute.

The *Olsen* panel clearly recognized that this case is in conflict with the previous jurisprudence and simply determined to choose a result and then adopt State law to support that result. The panel states quite frankly that, "without attempting to assess blame for all of the systematic cracks into which this case fell, the snail's pace

was not fair and that at some point it ceases to be justice." What is patently clear is that the panel *did* assess blame for the (in their own words "13 year old odyssey") length of the case and determined to change the consistent rulings of the Fifth Circuit regarding pre-judgment interest under Outer Continental Shelf Lands Act as some sort of punishment to some of the litigants without a fair or legal basis to do so. As the Fifth Circuit was well aware, defendants prevailed in the original trial of this case in 1974. It was not until 1979 that the Fifth Circuit Court of Appeals rendered its opinion, adopting the reasoning of the Louisiana Supreme Court and assessing strict liability against defendants. Without "assessing blame," the panel has rendered a decision contrary to all previously existing jurisprudence out of this Circuit regarding an award of pre-judgment interest under the Outer Continental Shelf Lands Act. The situation faced in *Olsen* is an exact replica of the *Berry*, *Aymond*, *Evans*, and *Musial* situations. The mandate of the Fifth Circuit in these cases was clear and those decisions represented major precedents of that Circuit which have never been controverted and therefore, should have been followed, allowing interest only from the date of judgment. The decision of the panel in *Olsen* is absolutely contrary to those previous decisions and, by applying Louisiana law, now states that pre-judgment interest is mandatory under Louisiana law! This Writ of Certiorari is requested for this Court to determine whether or not it will follow the uniform precedent that has existed since the Federal Interest Statute was enacted or whether that jurisprudence will now be overruled, holding that federal law now applies, but only, apparently, if the course through the Courts has been a speedy one. The tenets of *Huson* and *Rodrigue*, set down by the Supreme Court would be irrevocably altered, if *now*, the Federal Statute, totally inconsistent with the adjacent State's Interest Statute, is to be nullified on some trial

court's decision regarding equity. The decisions of *Huson* and *Rodrigue* would have little, if any, meaning under such an approach.

CONCLUSION

There can be no question but that under a case arising under the Outer Continental Shelf Lands Act (OCSLA), Federal District Court's are *bound* to apply the Federal Interest Statute, 28 U.S.C. Sec. 1961 which specifically precludes an award of pre-judgment interest. The decision of the Fifth Circuit Court of Appeals in *Olsen* radically alters the requirement that Courts apply the Federal law where "inconsistent" with state law, and instead, stands for the proposition that the adjacent state's interest statute should be applied. The tenets of *Rodrigue*, *supra* confirm the conclusion that 28 U.S.C. Sec. 1961 is *absolutely controlling* regarding the applicable time period for determining interest in this case. Section 1961 provides that interest *shall* be calculated from the date of entry of the Judgment, at the rate allowed by State law. There can be no more positive statement of Federal law, obligatory in its terms, and as such is controlling in an action brought under the Lands Act. Moreover, permitting interest to accrue from judicial demand would certainly be inconsistent with the result provided by Section 1961. All of the previous jurisprudence cited by the Fifth Circuit Court of Appeals and other Courts has consistently held that Section 1961 is applicable and mandates *that interest shall run from the date of judgment*. What the recent *Olsen* decision has accomplished is a *total reversal* of that jurisprudence, by affectively altering the basic tenets of the Supreme Court cases of *Rodrigue* and *Huson*, without ever attempting to reconcile uniform precedent. The *Olsen* panel's application of the Louisiana Interest Statute is absolutely

improper and would set about a chain of events in which state substitutive and procedural law would apply to all matters involving a case arising out of the Outer Continental Shelf Lands Act. Congress did not intend such a take over, at no time have the Courts allowed such an extension, and for that reason this decision must not be allowed to stand.

The Court's decision regarding Section 933(f) is in direct contravention of the Statutory Mandate contained within the statute, which *obligates* the employer or his compensation insurer to pay *all* compensation benefits in excess of the worker's tort recovery.

On the basis of the foregoing authorities, petitioner submits that the Court's decision must be reversed so as to:

(1) limit Argonaut's lien for compensation benefits paid as a result of the death of Kenneth E. Mahaney to the amount of tort damages awarded to his personal representative, Mary Olsen Haun, namely, \$16,000.00;

(2) relieve Shell of any obligation to assume the payment of future compensation benefits;

(3) reject the claim asserted by Argonaut with respect to compensation payments made for or on behalf of Raymond D. Louviere and Charles J. Martinez on the ground that Argonaut failed to rove the tort damages, if any, suffered by these two workers;

(4) disallow pre-judgment interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by depositing a copy of same in the United States Mail, postage prepaid, this 17th day of November, 1983.

MICHAEL M. CHRISTOVICH